



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 25, 2016

Ms. Heather M. Castillo  
Counsel for Buleson Independent School District  
Brackett & Ellis, P.C.  
100 Main Street  
Fort Worth, Texas 76102-3090

OR2016-04541

Dear Ms. Castillo:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 599657.

The Burleson Independent School District (the "district"), which you represent, received a request for information pertaining to the requestor's children.<sup>1</sup> The district states it does not

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<sup>1</sup>The requestor clarified his initial request for information. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

have some of the requested information.<sup>2</sup> The district also states it will withhold information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, section 552.024 of the Government Code, and Open Records Decision No. 684 (2009).<sup>3</sup> The district informs us it has released some of the requested information, but claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107(2), and 552.139 of the Government Code.<sup>4</sup> The district also states it notified the other parent of the children at issue of the district’s receipt of the request for information and of her right to submit arguments to this office as to why the requested information should not be released. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the claimed exceptions and reviewed the submitted representative sample of information.<sup>5</sup> We have also considered comments submitted by the requestor. *See id.*

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

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<sup>2</sup>The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *See generally Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

<sup>3</sup>The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>. Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of seeking a decision from this office.

<sup>4</sup>You acknowledge, and we agree, the district did not comply with the requirements of section 552.301(b) of the Government Code in raising section 552.139 of the Government Code. *See* Gov’t Code § 552.301(b), (e). Nevertheless, section 552.139 is a mandatory exception that can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider the claim of the district under that section.

<sup>5</sup>We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.101. This section encompasses section 261.201(a) of the Family Code, which provides as follows:

[T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). The district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, the district asserts Exhibit D consists of communications with the Texas Department of Family and Protective Services (the “department”) regarding a department investigation of child abuse or neglect under chapter 261. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201). Upon review, we find the information at issue is within the scope of section 261.201 of the Family Code. The district does not indicate the department has adopted a rule that governs the release of this type of information. Therefore, we assume no such rule exists. Given that assumption, the district must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.<sup>6</sup> *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in relevant part the following:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

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<sup>6</sup>As our ruling is dispositive, we do not address the other argument of the district to withhold this information.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find a portion of the remaining information constitutes medical records. Accordingly, the district must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with the MPA. However, we find the district has not established any of the remaining information consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. Thus, the remaining information is not confidential under the MPA, and the district may not withhold it on that ground.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides in part as follows:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Upon review, we find some of the remaining information, which we have marked, consists of mental health records that are subject to chapter 611 of the Health and Safety Code. Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception that the Texas Supreme Court recognized in *Texas Department of Public Safety v.*

*Cox Texas Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 117 (Tex. 2011) (“freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”). In the *Cox* decision, the Supreme Court recognized, for the first time, a common-law physical safety exception to required disclosure. *Cox*, 343 S.W.3d at 118. Pursuant to this common-law physical safety exception, the court determined “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned “vague assertions of risk will not carry the day.” *Id.* at 119. The district has not provided any arguments establishing release of any of the remaining information would create a substantial threat of physical harm to the individuals whose information is at issue. Accordingly, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.103 of the Government Code provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

Upon review, we conclude, for purposes of section 552.103, the district has not provided any arguments establishing litigation was either pending or reasonably anticipated when it received the request for information. Therefore, the district may not withhold any of the remaining information under section 552.103 of the Government Code.

Section 552.107(2) of the Government Code provides information is excepted from disclosure if “a court by order has prohibited disclosure of the information.” Gov’t Code § 552.107(2). The district has submitted a copy of a Final Protective Order that was issued by the District Court of the 325th Judicial District in Tarrant County. However, this protective order does not prohibit the district from releasing any of the requested information to the requestor pursuant to the Act. Thus, we conclude the district has not established a court has prohibited disclosure of any of the submitted information to the requestor. Therefore, we find the district may not withhold any of the remaining information from the requestor under section 552.107(2) of the Government Code.

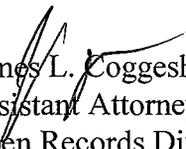
To conclude, the district must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The district must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA and section 611.002 of the Health and Safety Code. The district must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <http://www.texasattorneygeneral.gov/open/>

[orl\\_ruling\\_info.shtml](#), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

  
James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/bhf

Ref: ID# 599657

Enc. Submitted documents

c: Requestor  
(w/o enclosures)